Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-5471

CHENG, PUN HOI (A19 389 492)

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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No.

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Petitioner,

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed the judgment of the United States Board of Immigration Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS INVOLVED

1. Are aliens, who are born on the mainland of China who never resided in Taiwan, who never obtained citizenship in any other country, citizens of the Peoples Republic of China, or are they citizens of Taiwan?

2. Pursuant to and within the meaning of Section 8, U.S.C. Section 1253(a), can a person be a citizen of a country with whom the United States Government does not maintain full diplomatic relations?

STATUTE INVOLVED

8 U.S.C. Section 1253(a).

Section 243, (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three

months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either —

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien in to its territory.

STATEMENT OF THE CASE

The petitioner is a native and citizen of China. He was born in Foochow, China, which is located on the Mainland of China. He entered the United States on August 28, 1970, and has continuously resided in this country since that time. After he left his home country, he spent some time in Hong Kong.

He had a deportation hearing on May 19, 1972. At that time, he conceded the allegations in the order to show cause which indicated that he was a native of China and citizen of the Republic of China. At that hearing, he was granted the privilege of Voluntary Departure for one month, with an alternate order of deportation to the Republic of China at Taiwan, and in the alternative to Hong Kong. No objection was made at that time to the designations of the countries of deportation. The Immigration Judge named the Republic of China at Taiwan, pursuant to 8 U.S.C. Sec. 1253(a) of the I & N Act, and in reliance on previous decisions of the Board of Immigration Appeals with reference to the citizenship of Chinese aliens born on the Mainland of China. The petitioner was not ordered deported to the Mainland of China, and therefore, could not make an application for relief pursuant to Sec. 243(h) of the Immigration and Nationality Act, since the Mainland of China was not named as the country of deportation. See Section 8, C.F.R., 242.17(c).

In September, 1972, the petitioner made an application for political asylum, pursuant to the United Nations Treaty, claiming that he was a political refugee from the Mainland of China. This application was denied one year later. While his case was pending, and after his hearing, there were some internal memorandums of the Immigration Service indicating that persons like the petitioner were citizens and subjects of the Peoples Republic of China, and not Taiwan. (These memorandums are referred to in the opinion of the Circuit Court.)

In December, 1974, the petitioner moved to reopen his deportation proceedings to have the Mainland of China named as the country of which he was a citizen, and to amend the order of deportation. This motion was made in view of the changed circumstances that had occurred since the alien's hearing in 1972, and in view of the apparent change of the Government's position since that date.

The Immigration Judge denied the motion to reopen the deportation proceedings, because of the prior concessions made by the alien at his original deportation hearing. An appeal was taken to the Board of Immigration Appeals from this determination. The Board of Immigration Appeals affirmed this decision, finding that the respondent was not prejudiced by the Immigration Judge's decision denying the motion to reopen.

The petitioner then filed a petition to review the order of the Board of Immigration Appeals of December 30, 1974, basing his claim that he was a citizen, not of Taiwan, but of the Peoples Republic of China, and he should have been ordered deported to

the country of his citizenship, as the statute directs, 8 U.S.C. Sec. 1253(a). Had he been ordered deported to the Peoples Republic of China, he would have been allowed to apply for political asylum, 8 U.S.C. Sec. 1253(h). Had this application been granted, he would have received an indefinite stay of deportation and other practical benefits since he would have been in the position of being a recognized refugee. Therefore, the petitioner was prejudiced by the decision of the Immigration Judge and of the Board.

The decision of the Board of Immigration Appeals was affirmed by the United States Court of Appeals on August 18, 1975.

REASONS FOR GRANTING THE WRIT

The decision below raises a very substantial question of law affecting a great number of aliens under deportation proceedings in the United States.

Section 243 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1253, sets forth a pattern for deportation of aliens from the United States. The section prescribes, in succession, three mandatory priorities for the deportation of an alien. The first mandatory direction is deportation to a country designated by the alien, if that country is willing to accept him. The second step is reached when the alien either does not designate a country of deportation, or where the designated country refuses to accept the alien as a deportee. If either of these two occurrences happens, deportation is then directed to the country "of which such alien is a subject, national, or citizen." If the

country of citizenship will not accept such an alien, then deportation can be directed by the Attorney General in any one of several ways which includes to any country willing to accept the alien into its territory. The acceptance by the country of deportation is predicated upon a request being made by the United States Government. If the United States Government does not make a request of the countries named in step one and step two, they are prohibited from proceeding further.

In the case at the bar, as in other cases, it is obvious that the country of citizenship of the alien under proceedings becomes a most important question of fact and law that must be determined prior to the entry of the order of deportation and prior to the deportation of the alien.

In the instant case, the history of the development of Sec. 243 is important. The claim of the alien here is that the order to show cause and the order of deportation indicate that the petitioner is a citizen of the Republic of China on Taiwan. The alien disputes this finding.

In the early 1960's, the question of the citizenship of Chinese aliens born on the Mainland of China was before the Board of Immigration Appeals, and before the courts. At that time, the Board of Immigration Appeals, *In the Matter of S.Y.L. 9,* I & N 575, upheld the position of the Immigration Judge, citing *Rogers v. Cheng Fu Sheng,* 280 F.2d 683, said "that we recognize the Government of the Republic of China (the Nationalist Government) as the legal government of China, having its capital at Taipei, Taiwan (Formosa)."

There were also a number of court cases that held that these aliens, in view of the fact that our Government recognized them to be citizens of Taiwan, China, could properly be ordered deported to Taiwan, rather than to Mainland, China. *Shih v. Kennedy,* 297 F.2d 791 (C.A.D.C. 1961), *cert. denied,* 369 U.S. 844; *Fang v. Kennedy,* 317 F.2d 180 (C.A.D.C. 1963), *cert. denied; Fook v. Esperdy,* 320 F.2d 86 (C.A. 2, 1963).

In view of the decision of the Board of Immigration Appeals in 1962 mentioned above, and because of the court cases, Chinese aliens, at their deportation hearings were routinely conceding allegations of the order to show cause wherein they were alleged to be citizens of the Republic of China on Taiwan. The petitioner herein, at his deportation hearing, and upon advice of counsel conceded the correctness of the order to show cause, and did not object when the Republic of China on Taiwan was named as the country of deportation in the first instance, nor was any objection made to the naming of Hong Kong in the alternative. At that time, there was no question as a matter of law, that the decision of the Judge was correct.

At the time of the deportation hearing of the alien, the position of the Government appeared to be consistent upon its face. The Immigration Service following the court cases and the decisions of the Board of Immigration Appeals continued to act as if the aliens were not citizens of the Mainland of China, but of Taiwan. However, in 1973, the internal position of the Immigration Service and the Department of State seemed to change. In internal memorandums, the existence of which were unknown to the petitioner or his counsel indicating that persons

born on the Mainland of China, who had left China and gone to Hong Kong were citizens, not of Taiwan, but were considered to be citizens of the Peoples Republic of China.

For the first time in many years, the Immigration Service and the Department of State when referring to Chinese born on the Mainland of China referred to them as citizen of the Peoples Republic of China. If the Government's position has changed internally, then this change must be reflected in the orders to show cause issued by the Immigration Service, and subsequent deportation orders made by the Immigration Judges.

The petitioner herein made a motion to reopen his deportation based upon these memorandums, which were issued after the deportation hearing. The Court of Appeals in the decision below found that these internal memorandums did not change the position that the Government has held for the past twenty-five years. The Court below was sufficiently concerned to request the Government to submit a statement from the State Department with reference to their position today. The Court which quotes from the letter issued by the State Department (see Appendix A, page 5a), finds that the memorandum does not support the position of the petitioner. The petitioner alleges that the Court erred in their interpretation of the letter from the State Department.

The State Department letter does not say that the alien and others similarly situated are not citizens of the Mainland of China. It does not say that they are citizens of Taiwan, and that is truly the issue of this case. The letter merely states that the United States Government does not have full diplomatic

relations with the Peoples Republic of China, and therefore, can make no inquiry of that country. This is different from the position maintained by the Government in the early 1960 cases.

In the 1960 cases, the Government's position was that they did not recognize the existence at all of the Government of the Peoples Republic of China. There are other countries with whom we do not have diplomatic relations, but an alien's deportation can still be directed to those countries, pursuant to 8 U.S.C. Sec. 1253(a), *i.e.* Cuba. We do not have diplomatic relations with Cuba, but persons born in Cuba can and do have their deportation directed to that country, pursuant to 8 U.S.C. Sec. 1253(a).

The Court of Appeals, in its opinion, did not make a decision with reference to the country of citizenship of the alien, but merely accepted the State Department's interpretation of 8 U.S.C. Sec. 1253(a). The State Department, in its memorandum, consented to the Government's deportation of this alien to Hong Kong. The State Department is not the agency that interprets the operation of the Immigration Law. That they consent to the Government's position with reference to deportation to Hong Kong is of no moment and should have been disregarded by the United States Court of Appeals.

The only question that the State Department can properly answer is whether or not the alien is considered to be a citizen of the Peoples Republic of China or of Taiwan. The State Department made no such ruling in the memorandum submitted to the Court below.

In the decision of the Court below, the Court stated that the "Department of State has reaffirmed that it considers petitioners and persons in their circumstances to be citizens of Taiwan." The memorandum submitted by the State Department said no such thing (see Appendix C, page 11a).

It does not say that Taiwan is the proper country to order deportation to for a person born on the Mainland of China. It appears that the only fact or position that the State Department consents to is deportation to Hong Kong where it is conceded that petitioner is not a citizen or national. Neither the Court nor the Immigration Service can give the State Department the right to interpret such an important section of the Immigration and Nationality Act.

The question involved herein is a very substantial question which was recognized by the Court below and by other courts in recent years.

In view of the history that has occurred since the 1960's when these questions were first before the Immigration Service and courts, the writ in the instant case should be granted.

CONCLUSION

WHEREFORE, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ Jules E. Coven

LEBENKOFF & COVEN
Attorneys for Petitioners

Abraham Lebenkoff
Of Counsel

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2264

CHENG, PUN HOI (A19 389 492),
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Argued June 24, 1975

Before VAN DUSEN, ROSENN and WEIS, *Circuit Judges*

Jules E. Coven, Esq.
Lebenkoff & Coven, New York City, N.Y.,
Attorneys for Petitioner

John L. Murphy, Chief, Government Regulations Section, Criminal Division,
and
Chester J. Halicki, Esq., Department of Justice, Washington, D.C.,
Attorneys for Respondent

OPINION OF THE COURT

(Filed August 18, 1975)

PER CURIAM:

This Amended Petition for Review of a December 30, 1974, order of the Board of Immigration Appeals raises the issue of whether petitioner is a "subject national or citizen

of" the People's Republic of China within the meaning of 8 U.S.C. § 1253(a).[1]

At a deportation hearing on May 19, 1972, petitioner conceded the allegations in the Order to Show Cause, which indicated that he was a native of China and a citizen of the Republic of China.[2] At that hearing he was granted the privilege of voluntary departure, failing which he was ordered deported to the Republic of China (Taiwan) or, in the alternative, to Hong Kong. No objection was made at that time to the designations of such countries of deportation. The immigration judge named the Republic of China (Taiwan) pursuant to 8 U.S.C. § 1253(a) and in reliance upon previous decisions of the Board of Immigration Appeals with reference to the citizenship of Chinese aliens born on mainland China.

Petitioner did not depart the United States. In September 1972, he applied for political asylum under the

1. 8 U.S.C. § 1253(a) contains this language, *inter alia,* prescribing three steps for determining the country to which a deportable alien shall be sent:

Step 1. "The deportation of an alien . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . ."

Step 2. "Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. . . ."

Step 3. If the country designated in Step 2 will not accept the alien, "then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

"(1) to the country from which such alien last entered the United States;

"(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

. . .

"(5) to any country in which he resided prior to entering the country from which he entered the United States;

. . .

or

"(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

2. The petitioner was born in Foochow, China, on December 12, 1934. In November 1961, he fled to Hong Kong. He illegally entered the United States from Hong Kong in or about August of 1970.

United Nations Treaty, claiming that he was a political refugee from mainland China. This application was denied on November 21, 1973. On December 11, 1974, petitioner moved to reopen the 1972 deportation order on the ground that the United States had, in the interim, altered its position with respect to the People's Republic of China. The motion was denied by the immigration judge in an opinion dated December 16, 1974; the Board of Immigration Appeals affirmed in an opinion dated December 30, 1974, saying, *inter alia,* "[w]e agree with the well reasoned decision of the immigration judge."

In affirming, the Board found that petitioner was not "prejudiced by the immigration judge's designation of the places of potential deportation" since he had sought political asylum from the People's Republic of China and had never sought to be deported there. Order of December 30, 1974, at 3. Indeed, petitioner had not designated any country to which he desired deportation.[3] Under these circumstances, the Board affirmed the action of the immigration judge in ordering deportation first to Taiwan or, alternatively, to Hong Kong.

That part of the 1972 order directing petitioner's deportation to Taiwan was pursuant to 8 U.S.C. § 1253(a)'s provision for deporting an alien "to any country of which such alien is a subject national, or citizen if such country is willing to accept him. . . ."[4] Petitioner contends that

3. The decision of the administrative law judge contains this language at 11:

"All of these respondents deliberately and upon advice of experienced counsel, declined to designate a place of deportation. They likewise made no claim that they would be persecuted in either of the places designated, the Republic of China on Formosa and Hong Kong. By their refusal, deliberate and calculated, to designate their preference in the event of an order of deportation, it was required that their country of alleged citizenship be designated first. All of these respondents were advised that they were considered to be citizens of the Republic of China on Taiwan and raised no complaint. In fact they readily acknowledged the accuracy of that assertion in the Order to Show Cause. None of them expressed a desire to return to the Peoples Republic of China. None of them chose as the place of deportation the Peoples Republic of China or Hong Kong, in which latter country they had all either lived for many years or used as their base of operations while working as crewmen."

4. The Republic of China has refused to accept petitioner.

he is a citizen, not of Taiwan, but of the People's Republic of China and that he should, therefore, have been ordered deported to the latter country rather than to the former. Had he been ordered deported to the People's Republic, petitioner would have been allowed to apply for political asylum under 8 U.S.C. § 1253(h);[5] had this application been granted, he would have received an indefinite stay of deportation. Thus, petitioner argues, he was indeed prejudiced by the decisions of the immigration judge and of the Board.

Petitioner bases his claim that he is a "subject national, or citizen" of the People's Republic upon certain memoranda circulated within the Department of State. These memoranda[6] are read by petitioner as indicating that persons in petitioner's situation—born on mainland China who had left the mainland for Hong Kong and later entered the United States—are considered by the State Department to be citizens of the People's Republic rather than of Taiwan. This change in the State Department's position, it is urged, opens to question former decisions of

5. "(h) the Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

The United Nations Protocol Relating to the Status of Refugees is inapplicable to petitioner since he is not lawfully in the United States. *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177, 183-84 (D. N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir. 1974).

6. The February 14, 1973, Memorandum to certain District Directors of the I.N.S. (p. 4-B of Appendix) provides:

"The Central Office, after consultation with the Department of State, has been informed that there is no likelihood that citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong, nor is there any specific reason to believe that such persons will be returned by the Government of Hong Kong to countries where they will face persecution. The policy of the Department of State is to deny requests for asylum from such aliens provided they are deported to Hong Kong and not the Peoples' Republic of China and that the British Crown Colony of Hong Kong will accept them. Last minute requests concerning return of Chinese to Hong Kong as described above can be handled by this Service without consultation with the Department of State. It must be understood, however, that such aliens will have the benefits available to them in deportation hearings

the Board and of the courts that designated persons in petitioner's circumstances as citizens of Taiwan within 8 U.S.C. § 1253(a). See, *e.g.*, *Ng Kam Fook v. Esperdy*, 320 F.2d 86 (2d Cir. 1963), and cases there cited. In response to the inquiry of this court, the Department of State has reaffirmed that it considers petitioner, and persons in his circumstances, to be citizens of Taiwan:

> "That statute [8 U.S.C. § 1253(a)] provides that if an alien fails to designate a country to which he wishes to be deported, his deportation shall be directed toward 'any country of which such alien is a subject[,] national, or citizen if such country is willing to accept him into its territory.'
>
> "Normally, the United States does not deport aliens to countries with whose governments we do not have diplomatic relations. At the present time, with respect to persons who come from mainland China and claim to be citizens of the People's Republic of China and not the Republic of China, we believe there is no appropriate government with which we have diplomatic relations for purposes of directing a request for admission of an alien pursuant to Section 1253(a). Therefore, we believe it would be appropriate for the Attorney General to proceed to deport the petitioner, presumably to Hong Kong, pursuant to his discretionary authority as set forth in Section 1253(a)."

Thus, the State Department memoranda upon which the Amended Petition for Review was predicated do not have the meaning ascribed them by petitioner and can provide no basis for overturning the decision of the Board.

6. (Cont'd.)
including that of withholding deportation under section 243(h) and the application of the Convention on Refugees where that is appropriate."

The January 1973 letter to the Associate Commissioner for Operations of the I.N.S. (5-B of Appendix) contains substantially the same language.

Appendix A

For the foregoing reasons, the Amended Petition for Review will be denied. Costs shall be taxed against petitioner in accordance with *DiMattina v. I.N.S.*, 506 F.2d 443 (3d Cir. 1974).[7]

7. Since stipulations have been filed in each of the following cases providing that they are to be governed by the decision entered in this case, the Petitions for Review in these cases will be denied on the terms described in this paragraph: Third Circuit Nos. 74-2273, 75-1210, 75-1227, 75-1229, 75-1258, 74-2257, 75-1209, 75-1230, 75-1281, 75-1291, 75-1326, 75-1327, 75-1328, 75-1364, 75-1400, 75-1228, 75-1478, 75-1416, 75-1442, 75-1460, 75-1506, 75-1507, 75-1543, 75-1572 and 75-1573.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B — JUDGMENT OF THE UNITED STATES BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

Files: (1) A20 033 101 - Newark
(2) A20 345 409
(3) A15 761 135
(4) A15 450 213
(5) A20 060 923
(6) A15 196 022
(7) A15 950 337
(8) A20 062 391
(9) A19 389 492

In re: (1) LEE CHUNG TO
(2) LI YI LUNG
(3) LI CHUN FONG
(4) LAM YAN KWUN
(5) LAM KWOK KWONG
(6) LAM SIN MEI
(7) NGAI FAT KWAI
(8) LAU YAM TIN
(9) CHENG PUN HOI

IN DEPORTATION PROCEEDINGS

APPEAL

Appendix B

ON BEHALF OF RESPONDENTS:

Jules E. Coven, Esq.
Lebenkoff & Coven
One East 42nd Street
New York, New York 10017

CHARGES:

Order:

Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Nonimmigrant - remained longer (Aliens (1), (3), (4), (6) and (7))

Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Entered without inspection (Aliens (2), (5), (8) and (9)

APPLICATION: Motion to reopen

The alien respondents have appealed from the December 16, 1974 decision of an immigration judge in which the respondents' motions both to reopen their respective deportation proceedings and to stay their deportation were denied. Counsel for the respondents applied telephonically for stays of deportation pending our receipt of the records on appeal. We denied the requested stays in a decision dated December 16, 1974. The records on appeal have arrived, and we shall dismiss the appeals from the immigration judge's decision.

The respondents are natives of China. Each respondent was accorded a deportation hearing in either 1972, 1973, or 1974. In

Appendix B

each case, the immigration judge ordered that deportation, if necessary, should initially be sought to the Republic of China on Taiwan. The immigration judge also entered an alternative order of deportation to Hong Kong, should deportation to Taiwan be precluded. None of the respondents appealed from the decision specifying the places of his potential deportation.

The Republic of China on Taiwan evidently has not accepted any of the respondents. They are apparently scheduled for deportation to Hong Kong.

Counsel for the respondents alleges that the orders of deportation are fatally defective because the immigration judge failed to specify the proper place of deportation in the first instance. The respondents maintain that their deportation should initially have been directed to the People's Republic of China. In this regard, counsel alleges that the Government has been inconsistent in its position regarding the citizenship of persons born in "mainland China."

Assuming, arguendo, that more than a minor inconsistency exists, we fail to see how any of the respondents has been prejudiced by an immigration judge's designation of the places of potential deportation. The records indicate that several respondents, namely, Li Chun Fong,[1] Lam Yan Kwun, Lam Kwok Kwong, Lam Sin Mei, Lau Yam Tin, and Cheng Pun Hoi, have submitted claims seeking asylum as refugees from the People's Republic of China. Furthermore, none of the

1. The asylum application of Li Chun Fong was inadvertently included in the record relating to Ngai Fat Kwai.

Appendix B

respondents alleges that he wishes to be deported there. As the immigration judge pointed out in his decision denying these motions, the respondents appear to seek no more than to delay their eventual deportation to Hong Kong.

We agree with the well-reasoned decision of the immigration judge.

ORDER: The appeals are dismissed.

s/ Louisa Wilson
Acting Chairman

APPENDIX C — STATE DEPARTMENT LETTER OF JULY 18, 1975

DEPARTMENT OF STATE

Washington, D.C. 20520

July 18, 1975

Mr. John L. Murphy
Government Regulations Section
Criminal Division
Department of Justice
Washington, D.C. 20530

Re: Cheng, Pun Hoi v. Immigration and Naturalization Service, No. 74-2264
Third Circuit Court of Appeals

Attention: Mr. Chester J. Halicki

Dear Mr. Murphy:

This is in reply to your letter of July 2 in which you inquire whether petitioner is a "subject, national or citizen" of the People's Republic of China within the meaning of 8 USC §1253(a). That statute provides that if an alien fails to designate a country to which he wishes to be deported, his deportation shall be directed toward "any country of which such alien is a subject [,] national, or citizen if such country is willing to accept him into its territory."

Appendix C

Normally, the United States does not deport aliens to countries with whose governments we do not have diplomatic relations. At the present time, with respect to persons who come from mainland China and claim to be citizens of the People's Republic of China and not the Republic of China, we believe there is no appropriate government with which we have diplomatic relations for purposes of directing a request for admission of an alien pursuant to Section 1253(a). Therefore, we believe it would be appropriate for the Attorney General to proceed to deport the petitioner, presumably to Hong Kong, pursuant to his discretionary authority as set forth in Section 1253(a).

Sincerely,

s/ George H. Aldrich
George H. Aldrich
Deputy Legal Adviser

APPENDIX D — STATE DEPARTMENT LETTER OF JANUARY 22, 1973

DEPARTMENT OF STATE

Washington, D.C. 20520

January 22, 1973

Dear Mr. Greene:

Thank you for your letter of November 17, 1972, (CO 212.32-P). We recognize the problems raised by last-minute requests for asylum from aliens who could have applied earlier for a hearing under Section 243(h) of the Immigration and Nationality Act.

In your letter you refer to the specific problem of citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time. There is no likelihood that these aliens will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong nor have we any specific reason to believe that any of such persons will be returned by that government to countries where they will face such persecution. Our policy is to deny such requests for asylum provided: (a) they are deported to Hong Kong and not the Peoples' Republic of China and (b) that the Colony will accept them.

We agree that such last minute requests concerning the return of Chinese to Hong Kong as described above can be

handled by the Immigration and Naturalization Service without consultation with the Department through our office. We understand from your letter that during the deportation hearings all such aliens will have available to them the various benefits of the Immigration and Nationality Act, including withholding of deportation under Section 243(h), and the application of the Convention on Refugees whenever appropriate in their cases. If there are any questions concerning individual asylum requests in such cases or if a case appears to be politically sensitive, we are prepared to provide you with an advisory opinion by telephone or in writing on an urgent basis.

Mr. James F. Greene,
Associate Commissioner for Operations,
Immigration and Naturalization Service,
Room 743, 119 D Street, N.E.,
Washington, D.C. 20536.

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No. 75-547

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

CHENG, PUN HOI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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1. Petitioner was born in Foochow, on the mainland of China, on December 12, 1934. He subsequently migrated to Hong Kong in 1961 and illegally entered this country on or about August 28, 1970 (R. 24).[1]

Thereafter, petitioner was served with an Order to Show Cause, charging that he was deportable since

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[1] "R." designates references to the certified administrative record filed with the court of appeals.

he had entered the country without inspection (R. 24). Following a deportation hearing on May 19, 1972, at which petitioner conceded that the factual allegations in the Order to Show Cause were true, he was ordered deported (R. 23). Upon the advice of his counsel, petitioner declined to designate a place of deportation; the immigration judge therefore ordered him deported to the Republic of China on Formosa or, alternatively, to Hong Kong (R. 23).[2] Petitioner was granted the privilege of voluntary departure, but he did not depart within the period authorized.[3]

On September 25, 1972, pursuant to the United Nations Protocol Relating to the Status of Refugees, petitioner filed an application for political asylum in the United States, claiming that he was a political refugee from mainland China. He alleged that he had fled mainland China because of the Communist control of that country (R. 22). This application was denied on November 21, 1973 (R. 20).[4]

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[2] The Republic of China on Formosa subsequently refused to accept petitioner.

[3] An alien who has been deported must receive special authorization from the Attorney General before he may reenter this country. 8 U.S.C. 1182(a)(17). If a deportable alien departs voluntarily, however, he is not subject to this particular statutory requirement.

[4] Petitioner subsequently participated in litigation seeking to enjoin the deportation of a group of more than 100 aliens, on the ground that the denial of asylum was arbitrary, capricious and illegal (R. 11-12). The district court denied relief, holding that each of the aliens was, by his own admission, illegally in the United States and therefore was not entitled to the benefits of the Protocol. See *Kan Kam Lin, et al.* v. *Rinaldi*, 361 F. Supp. 177 (D. N.J.), affirmed, 493 F.2d 1229 (C.A. 3), certiorari denied, 419 U.S. 874. See also Pet. App. 4a, n. 5.

On December 11, 1974, petitioner moved to reopen the 1972 deportation proceeding to correct the deportation order to reflect the fact that petitioner is a citizen of the Peoples Republic of China and that he should have been ordered deported to that country rather than to the Republic of China at Taiwan. The immigration judge denied the motion with an opinion (R. 10-14). Finding itself in agreement with the decision of the immigration judge, the Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. 7a-10a). In a *per curiam* opinion dated August 18, 1975, the court of appeals denied the petition for review (Pet. App. 1a-6a).

2. Petitioner argues that he is a citizen of the Peoples Republic of China, rather than of Taiwan, and that the immigration judge therefore erred in not ordering his deportation to mainland China pursuant to the provisions of 8 U.S.C. 1253(a). Petitioner so argues in order to make himself eligible, as a citizen of the Peoples Republic of China, to apply for political asylum in this country under 8 U.S.C. 1253(h) (Pet. 6).[5]

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[5] Section 1253(h) provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political

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a. Under 8 U.S.C. 1253(a) there is a three-step procedure to determine the place of deportation. The first step is deportation to the country designated by the alien; here, as we have noted, petitioner refused to designate such a country. The second step, which is reached when the alien refuses to designate a country or the designated country refuses to accept him, provides that the alien may be deported to "any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory." If the country of nationality is unwilling to accept the alien, then the third step is reached and the Attorney General has discretion to select a country from a series of alternatives, which include, *inter alia*, deportation to "the country from which [the] alien last entered the United States." 8 U.S.C. 1253(a)(1). See Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.17c (1975).

b. As petitioner acknowledges, at the time of his deportation hearing it was established that a Chinese alien, born on mainland China, was considered a citizen of the Republic of China on Formosa for the purposes of deportation proceedings. See, *e.g.*, *Ng Kam Fook* v. *Esperdy*, 320 F.2d 86 (C.A. 2), certiorari denied, 375 U.S. 955; *Lee Wei Fang* v. *Kennedy*, 317 F.2d 180 (C.A. D.C.). Petitioner contends, however, that since his deportation the Department of State has changed its position with respect to the

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opinion and for such period of time as he deems to be necessary for such reason.

Peoples Republic of China, that it now regards aliens from mainland China as citizens of that country and that, accordingly, the Peoples Republic of China should now be designated as petitioner's country of deportation.

The characterization in internal State Department memoranda of persons born on the mainland of China as citizens of the Peoples Republic of China does not alter the propriety of the deportation order in this case. As the court below agreed, there is no appropriate government with which the United States has diplomatic relations for purposes of Section 1253 (a). (Pet. App. 5a). The word "country" as used in the second step of 8 U.S.C. 1253(a) means a recognized political entity, not merely a geographical location. As the court of appeals stated in *Ng Kam Fook* v. *Esperdy*, *supra*, 320 F.2d at 88:

> In connection with naturalization and citizenship the dominant consideration is not geographical and in such case it is not unreasonable to construe the word "country" as meaning a foreign state with the rights and responsibilities under international law of a member of the family of nations. This apparently is what the court had in mind when Judge Hand said in the Man case in referring to deportation of a Chinese alien to the mainland under the third priority. "We assume that he cannot be regarded as a 'subject national, or citizen' of the Communist Government, because we do not recognize that as more than a *de facto* govern-

ment." [Citing *United States ex rel. Tom Man* v. *Murff*, 264 F.2d 926, 928 (C.A. 2).]

Thus, even if petitioner were regarded as a citizen of the Peoples Republic of China, there is no appropriate avenue to direct a request for admission of an alien to that country pursuant to Section 1253 (a). See also *Lee Wei Fang* v. *Kennedy, supra*, 317 F.2d at 184.

Since the United States recognizes and maintains diplomatic relations only with the Republic of China at Formosa, petitioner's deportation order to that country was proper. However, since the Republic of China at Formosa indicated that it would not accept petitioner as a deportee, deportation to Hong Kong, the location of petitioner's residence prior to his illegal entry into this country, was a permissible option within the discretion of the Attorney General under the third step of the Act.

c. Assuming, *arguendo*, that the Peoples Republic of China is regarded as a "country" under the second priority of the statute, petitioner has failed to present any evidence that he is a subject national of that government. Indeed, the evidence indicates that the contrary is true. Petitioner was born on the mainland of China in 1934, at a time when that country was controlled by the Nationalist government. The record demonstrates that petitioner fled mainland China "because of the Communist control of that country" (R. 22). He thereafter resided in Hong Kong for a period of approximately nine years. Following his illegal entry into the United States and

subsequent deportation proceeding, petitioner requested political asylum from the "Communist dominated" regime on the mainland. (R. 21, 22). It is apparent from the record that petitioner's allegiance is not to the present government on the mainland. Since the term "national" as used in the Immigration and Naturalization Act (8 U.S.C. 1101(a)(21)) is defined as a person owing permanent allegiance to a state (see *Delany* v. *Moraitis*, 136 F.2d 129, 130 (C.A. 4)), in these circumstances petitioner's allegiance must remain with the Nationalist government now on Formosa. See *Lee Wei Fang* v. *Kennedy, supra*, 317 F.2d at 185-186.

Finally, it is also clear that in no circumstances would petitioner actually wish to be deported to the Peoples Republic of China and that he would immediately seek political asylum in this country if he were ordered deported there. In assessing petitioner's claim that his place of deportation must be changed to the Peoples Republic of China, the immigration judge aptly observed (R. 12, 13):

> We must therefore ask ourselves why this strange, belated behavior. In my estimation it is meant solely to confound, confuse and delay the government in its efforts to deport all of these respondents.
>
> * * * * *
>
> I will not permit such a futile operation. Counsel is not seeking true justice but only a delay of the ultimate inevitable result, their deportation to Hong Kong.

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In these circumstances, the immigration judge properly denied petitioner's motion to reopen since it was not made in good faith but solely for the purposes of delay and as a means to obtain political asylum in the United States. See, *e.g.*, *Ngai Chi Lam* v. *Esperdy*, 411 F.2d 310 (C.A. 2); *Lee Wei Fang* v. *Kennedy*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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